

FAX TRANSMISSION

WV SUPREME COURT OF APPEALS
Administrative Office
1900 Kanawha Blvd., East, Bldg. 1 Room E-100
Charleston, WV 25305
VOICE: 304-340-2306
TTY: 304-558-4219
FAX: 304-558-1212

To: John O'Brien

Date:

Fax #: 757-257-6146

Pages: , (including cover)

From: Kandi L. Greter
Information Services Specialist

Subject:

COMMENTS:

DO NOT REMOVE
FROM FILE

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT,
WAUNONA MESSINGER CROUSER,
REBECCA MORLOCK, ANTHONY BEEZEL,
MARY MONTGOMERY, MARY LUZADER,
TRUMAN R. DESIST, LARRY BEEZEL, and
JOSEPH BRADSHAW, individuals residing in West Virginia,
on behalf of themselves and all others similarly situated,

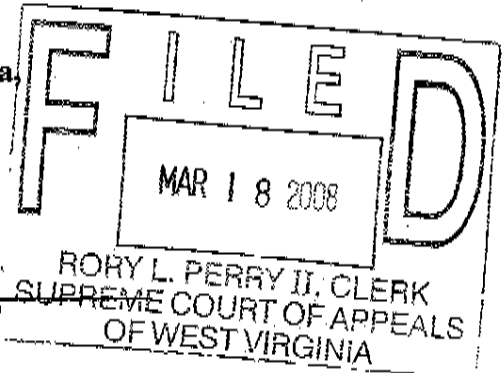
Petitioners/Plaintiffs,

vs.

Appeal No. _____

E.I. DU PONT DE NEMOURS AND COMPANY,
a Delaware corporation doing business in West Virginia,
MEADOWBROOK CORPORATION, a dissolved
West Virginia corporation, MATTHIESSEN & HEGELER ZINC
COMPANY, INC., a dissolved Illinois corporation formerly
doing business in West Virginia, and
T. L. DIAMOND & COMPANY, INC.,
a New York corporation doing business in West Virginia,

Respondents/Defendants.



FILED IN 15TH
 CIRCUIT COURT
 J. Jones
 2008 MAR 17 PM 3:26
 Perry II

PETITION FOR APPEAL OF PETITIONERS/PLAINTIFFS

Prepared on behalf of Petitioners/Plaintiffs by:

R. Edison Hill, WWSB #1734
Hill, Peterson, Carper, Bee &
Deitzler, PLLC
500 Tracy Way
Charleston, WV 35311-1261
(304)345-5667

Gary W. Rich, WWSB #3078
Law Office of Gary W. Rich, L.C.
212 High Street, Suite 223
Morgantown, WV 26505
(304) 292-1215

Perry B. Jones, WWSB #9683
Jerald E. Jones, WWSB #1920
West & Jones
212 High St., Suite 223
Clarksburg, WV 26302
(304)292-1215

J. Farrest Taylor, Esq.
Cochran, Cherry, Givens, Smith,
Lane & Taylor, PC
163 W. Main St.
Dothan, AL 36301
(334)793-1555

(Cont.)

Michael Papantonio
Levin, Papantonio, Thomas,
Mitchell, Eschsner & Proctor, PA
316 S. Baylen St, Suite 400
Pensacola, FL 32502
(850)435-7074

Robert F. Kennedy, Jr.
Kennedy & Madonna, LLP
48 Dewitt Mills Rd.
Hurley, NY 12443
(845)331-7514

TABLE OF CONTENTS

I.	THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL	1
II.	STANDARD OF REVIEW	2
III.	STATEMENT OF THE FACTS	3
IV.	ASSIGNMENT OF ERROR	6
V.	DISCUSSION OF THE LAW	7
	A. THE COURT DISREGARDED EVIDENCE DEMONSTRATING THAT THE WAIVERS AND EASEMENTS EXCEEDED THE CONTEMPLATION OF THE PARTIES AT THE TIME OF THE EXECUTION	7
	B. THE TRIAL COURT FAILED TO ADDRESS WHETHER, OR ERRONEOUSLY CONCLUDED THAT, THE EXCULPATORY CLAUSE PERMITS GRASSELLI AND ITS SUCCESSORS TO ACT UNREASONABLY OR RECKLESSLY	8
	C. THE TRIAL COURT FAILED TO ADDRESS WHETHER, OR ERRONEOUSLY CONCLUDED THAT, THE EXCULPATORY PROVISIONS PERMITTING PERPETUAL CONTAMINATION OF HAZARDOUS AND CARCINOGENIC HEAVY METALS DO NOT VIOLATE PUBLIC POLICY	10
VI.	CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<i>Bartlett v. Grasselli Chem. Co.</i> , 92 W. Va. 445, 115 S.E. 451, 452, 453, 1922)	3, 4
<i>Cogar v. Sommerville</i> , 180 W. Va. 714, 379 S.E.2d 765, 769 (1989)	8
<i>Conley v. Hill</i> , 115 W. Va. 175, 174 S.E. 883 (1934)	8
<i>Continental Coal co. v. Connellsville By-Product Coal Co.</i> , 104 W. Va. 44, 138 S.E. 737 (1927)	8, 9
<i>Cordle v. General Hugh Mercer Corp.</i> , 174 W. Va. 321, 325, 325 S.E.2d 111, 114 (1984)	11
<i>Dunlap v. Berger</i> , 211 W. Va. 549, 558, 567 S.E.2d 265, 274 (W. Va. 2002)	11
<i>Griffin v. Fairmont Coal Co.</i> , 59 W. Va. 480, 53 S.E. 24	9
<i>Hilton v. Duke Power Co.</i> , 254 F.2d 118 (4 th Cir. 1958)	8
<i>Johnson v. Pocahontas Coal Co., Inc.</i> , 160 W. Va. 261, 263, 234 S.E.2d 309, 310 (1977)	8, 9
<i>Lyon v. Grasselli Chemical. Co.</i> , 106 W. Va. 518, 146 S. E. 2d 57 (1928)	3, 4, 6
<i>Mitchell v. Broadnax</i> , 208 W.Va. 36, 42, 537 S.E.2d 882, 888 (2000).....	3
<i>Mullins v. Beatrice Pocahontas Co.</i> , 432 F.2d 314, 318, 319-320, (4 th Cir. 1970)	10
<i>Murphy v. North American River Runners, Inc.</i> , 186 W. Va. 310, 316, 412 S.E.2d 504, 510 (W.V. 1991).	9

<i>Painier v. Peavy</i> , 192 W. Va. 189, 451 S. E.2d 755 (1994)	2
<i>Russell v. Island Creek Coal Company</i> , 182 W. Va. 506, 515, 389 S.E.2d 194, 204 (W. Va. 1990)	7
<i>Stamp v. Windsor Power House Coal Company</i> , 154 W. Va. 578, 584, 177 S.E.2d 146, 150 (W.V. 1970)	9
<i>Wellington Power Corp. v. CAN Surety Corp.</i> , 217 W. Va. 33, 614 S.E.2d 680 (W. Va. 2005)	11
<i>Wetzel v. Employers Service Corp. of W. Va.</i> , 656 S. E.2d 55 (W. Va. 2007)	2

I. The kind of proceeding and nature of the ruling in the lower tribunal.

Plaintiffs petition to appeal the trial court's grant of summary judgment, which determined that releases and easements executed in the 1920s provided immunity to the owners and operators of the Spelter zinc smelter for claims of environmental contamination to properties affected by the releases and easements. The releases were part of a settlement between farmers and Grasselli, who owned and operated the smelter until 1928. The farmers had complained that the smelter was having an adverse impact on their crops and livestock. A number of farmers filed lawsuits and later settled their claims, agreeing to a release that was to run with the land.

On June 15, 2004, plaintiffs, residents who reside near the Spelter smelter, filed a class action complaint in the Circuit of Court of Harrison County seeking the establishment of a medical monitoring fund as well as damages for the contamination of their properties and homes with arsenic, cadmium and lead (all byproducts of zinc smelting). Following a three day evidentiary hearing in May 2006, Judge Thomas Bedell certified the matter to proceed as a class action consisting of a Property Class and a Medical Monitoring class.

On July 6, 2007, DuPont filed a motion for summary judgment arguing that, among other things, "the claims of numerous individual plaintiffs are barred by the operation of releases and easements granted to the Grasselli Chemical Company and its successors and assigns which expressly allow for the discharge of the products and by-products of the smelter's operations over and into their lands." Approximately, 40% of the class area, representing 265 structures, was covered by the releases. On September 14, 2007, the trial court granted DuPont's motion for partial summary judgment on the properties that are

covered by the Grasselli releases.¹ The trial court found the Grasselli Deeds executed in the 1920s to be valid and enforceable against current landowners who are successors in title to the grantors of the Grasselli Deeds and dismissed the property claims of those class members.

In arriving at its conclusion that DuPont was entitled to summary judgment on this issue, the trial court failed to consider (1) evidence that would lead a reasonable person to conclude that the original property owners never contemplated that the release would allow the owners of the smelter to contaminate the surrounding area with hazardous and carcinogenic wastes; (2) that, as a matter of law, the releases do not provide immunity to the owners and operators of the plant for their failure to use reasonable care in the operation of the smelter, and (3) that, as a matter of law, the releases violate public policy. The trial court's grant of summary judgment was improper and should be reversed.

II. Standard of Review.

The trial court's grant of summary judgment is subject to a de novo review by this Court, which applies that same standard for granting summary judgment that a circuit court must apply. *Painter v. Peavy*, 192 W. Va. 189, 451 S. E.2d 755 (1994); *Wetzel v. Employers Service Corp. of W. Va.*, 656 S. E.2d 55 (W. Va. 2007). Pursuant to that standard, "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify application of the law." *Wetzel*, 656 S.E.2d at 59 (quoting Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)). Decisions regarding public

¹ The trial court entered a second Order Granting in Part and Denying in Part DuPont's Motion for Summary Judgment on September 20, 2007. The portions of both Orders addressing the Grasselli Deeds are virtually identical in substance.

policy considerations are questions of law that are subject to plenary review by this Court. *Mitchell v. Broadnax*, 208 W.Va. 36, 42, 537 S.E.2d 882, 888 (2000).

The trial court's summary judgment will not pass these standards of review for three reasons. First, to sustain the trial court's ruling, this Court, drawing all reasonable inferences in favor of the plaintiffs and without weighing the evidence, must find that the evidence leads to only one reasonable conclusion: that the parties to the releases contemplated that their properties would be repositories of carcinogenic waste from the smelter. A reasonable fact finder could determine otherwise considering that Grasselli, at the time the releases were executed, claimed that the contamination from the smelter could be neutralized with fertilizer, failed to disclose a report documenting the dire environmental consequences of the smelter, and never mentioned that arsenic and cadmium were part of the smelter emissions. Second, as a matter of law, the releases do not shield the smelter owners and operators if they acted unreasonably. The trial court was presented with substantial evidence of unreasonable conduct of the smelter owners and operators, which directly caused harm to the plaintiffs' properties. Finally, as a matter of law, the releases are void because they violate public policy by giving polluters an unfettered right to contaminate.

III. Statement of Facts²

Grasselli Chemical Company was the predecessor to the DuPont chemical empire and operated the Spelter zinc smelter from 1910 through 1928. *Lyon v. Grasselli Chem. Co.*, 106 W. Va. 518, 146 S. E. 2d 57 (1928); *Bartlett v. Grasselli Chem. Co.*, 92 W. Va. 445, 115 S.E. 451 (1922). In 1919, local farmers began bringing trespass and nuisance

² In addition to relying on the cases cited herein for their Statement of Facts, Plaintiffs/Petitioners also rely on Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment at 18-20, Plaintiffs' Exhibit 19 (Report of Steven Amter) attached thereto, and Plaintiffs' Exhibit 20 (Deposition of Steven Amter) attached thereto.

actions against Grasselli Chemical Company for damage to their land and livestock. *Bartlett v. Grasselli Chemical Co.*, 92 W. Va. 445, 115 S.E. 451 (W. Va. 1922); *Lyon v. Grasselli Chemical Co.*, 106 W. Va. 518, 146 S.E. 57 (1928). The farmers contended that chemical deposits from the smelter, in the form of fumes, gases and dust emitted from the Grasselli's furnaces and carried over the land by air currents, were affecting the fertility of the land and the health of livestock. *Bartlett*, 115 S.E. at 451. Specifically, the farmers alleged deposits of zinc-oxide and sulphates were causing "excessive acidity of the soil and consequent diminution of its fertility and producing capacity." *Id.* at 451-452. Some of the farmers recovered judgments against Grasselli for the damage to their land, but the West Virginia court held that these judgments were for nuisance actions and, as such, Grasselli would be susceptible to future actions. *Id.* at 453.

To protect itself against successive nuisance suits from the same landowners, *see e.g., Lyon v. Grasselli Chemical Co.*, 146 S.E. at 58 (second action by Lyons against Grasselli for nuisance), Grasselli executed a number of deeds with local landowners which would supposedly allow Grasselli to deposit substances on neighboring properties without fear of successive nuisance suits. Reflecting the concerns raised in the lawsuit about the productivity and fertility of the land, the release primarily sought to excuse Grasselli from any injury "to said land of said [property owners], the productivity and/or products of said land, and/or any property or thing, real, personal or mixed, therein or thereon." The release purported to grant a perpetual easement, running with the land, to the plant owners and operators allowing for the discharge of substances on to their properties.³ Each deed contained the same language releasing current and future operators and owners of the zinc

³ Deed (Exhibit 18 to Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment). Although the deeds enumerated various forms of discharges, the deeds did not specifically include "heavy metals" as a permissible discharge.

plant from liability for property damage and granting them a perpetual easement for the discharge of substances from the plant over the adjoining owners' lands.

Although DuPont contends that "[i]n entering into the deeds, the property owners understood the nature of the operations at the smelter and knowingly assumed the risks associated with its continued operation," DuPont has no basis for its assertion and the trial court should not have relied on it to the exclusion of all other evidence. In fact, the evidence shows that Grasselli purposefully concealed from the public the extent of the risks related to emissions. See Amter Report (12/6/06) at 7-8 and Amter Deposition (7/9/07) at 612:4-612:25 (Exhibits 19 and 20 to Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment). Throughout the 1920s lawsuits, Grasselli disputed the extent and risks of any emissions and even refused to release the environmental investigation (referred to as the Bear & Morgan Report) it had commissioned. The lawsuits themselves concentrated on damage to vegetation and livestock and there was no testimony relating lead or arsenic (or cadmium) in those lawsuits to the smelter smoke and human health risk. See Amter Deposition (7/9/07) at 580:4-581:13 (Exhibit 20 to Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment).

In a concerted effort to minimize and conceal the toxic effects of the smelter on the surrounding properties, Grasselli kept secret the contents of a detailed study that had been performed by preeminent scientists of the day and confirmed that plant emissions were poisoning livestock and injuring and killing extensive areas of vegetation. In 1919, Grasselli commissioned two prominent geologists, Dr. Firman E. Bear and Francis M. Morgan, to investigate the farmers' claims of pollution. Bear and Morgan conducted interviews, collected soil samples and analyzed the zinc content of flue dust and found high levels of

zinc. They also took photographs of the surrounding land and conducted laboratory studies documenting the dramatic effects of the smelter on the surrounding environment. Even though this report addressed the very claims being brought by the 1920s plaintiffs, Grasselli continued fighting the lawsuits and kept the Bear and Morgan investigation and report “confidential.” The Bear and Morgan report remained hidden in the files of the DuPont document repository until this litigation. *See* Amter Report at 6-8 (Exhibit 19 to Plaintiffs’ Response in Opposition to Defendant DuPont’s Motion for Summary Judgment).

In 1928, thanks in part to Grasselli’s own attempts to conceal the extent of the damage being caused by its smelter, the landowners believed the problem was generally “smelter smoke” and had little, if any, understanding of the deadly chemicals contained within the smoke and the waste pile, much less an understanding of the dangers they presented to human health. Grasselli contended that the damaged soil could be restored to “its original fertility and productivity” through “a liberal application of fertilizers.” *Lyon*, 146 S.E. at 58. As the parties now know, however, the surrounding land has been damaged by more than just excessive amounts of zinc oxide and sulphates. It has been contaminated with arsenic, cadmium and lead—deadly metals that cannot be remedied with simple applications of fertilizer.

IV. Assignments of Error

Petitioners contend the trial court committed the following errors:

- The trial court failed to consider evidence that such devastating pollution was outside the contemplation of the original parties to the 1920s Grasselli Deeds, rendering the releases and unenforceable;

- The trial court failed to address whether, and/or erroneously concluded that, the releases provided full immunity to the zinc plant operators and owners for any conduct, including unreasonable conduct; and
- The trial court failed to address whether, and/or erroneously concluded that, an unfettered and perpetual right to pollute surrounding communities with heavy metal toxins with devastating human health effects does not violate public policy.

V. Discussion of the Law

A. **The Court disregarded evidence demonstrating that the waivers and easements exceeded the contemplation of the parties at the time of the execution.**

In opposition to DuPont's motion for summary judgment, Petitioners/Plaintiffs presented evidence disputing that the contracting parties intended to waive the property rights at issue—i.e., contamination of their property by carcinogenic and deadly heavy metals. Before a waiver can be construed as barring a claim, there must be no dispute that the contracting parties intended to waive the claim at issue. The Court disregarded and did not address evidence suggesting that the contamination and resulting damage at issue was not within the contemplation of the original contract parties. Petitioners contend that the evidence reflecting the farmers' lack of understanding regarding the full extent of the harm caused by the pollution as well as Grasselli's concerted efforts to conceal the extent of the pollution creates a jury question whether the parties contemplated the present contamination and claims related thereto.

"Any waiver of a right in a deed must be one that is within the contemplation of the parties." *Russell v. Island Creek Coal Company*, 182 W. Va. 506, 515, 389 S.E.2d 194, 204 (W. Va. 1990). A release ordinarily covers only such matters as may fairly be said to have

been within the contemplation of the parties at the time of its execution. *Id.* at 200. (quoting *Conley v. Hill*, 115 W. Va. 175, 174 S.E. 883 (1934)). “[I]n reading the instrument of conveyance, the rights of the parties and the determination of whether the waiver of such rights is knowing and specific must be ‘construed in light of the conditions and reasonable expectations of the parties at the time it is made.’” *Id.* at 204 (quoting *Cogar v. Sommerville*, 180 W. Va. 714, 379 S.E.2d 765, 769 (1989)).

At the time they entered the waivers, the original landowners had little, if any, knowledge of the dangerous propensities of the constituents of concern and the harm they would ultimately could and would cause. Given that key pieces of information were still being withheld from the landowners by Grasselli, the landowners could not have reasonably foreseen the future injuries of the kind which have subsequently occurred.⁴ Although the intention of the original landowners should have be a factual question for the jury to decide, the trial court disregarded evidence suggesting the current claims are outside the contemplation of the contracting parties in the 1920s.

B. The trial court failed to address whether, or erroneously concluded that, the exculpatory clause permits Grasselli and its successors to act unreasonably or recklessly.

The trial court did not address Plaintiffs/Petitioners’ claims that West Virginia imposes limits on exculpatory provisions, and, as such, the zinc plant operators are still liable for any unreasonable conduct—regardless of any release or easement. In the context of liability waivers, West Virginia requires parties to adhere to a reasonable standard of conduct. *See, e.g., Johnson v. Pocahontas Coal Co., Inc.*, 160 W. Va. 261, 263, 234 S.E.2d 309, 310 (1977); *Continental Coal co. v. Connellsville By-Product Coal Co.*, 104 W.V. 44,

⁴ *See Hilton v. Duke Power Co.*, 254 F.2d 118 (4th Cir. 1958)(finding the issue of contemplation of parties to a release contained within a deed to be a question of fact for the jury).

138 S.E. 737 (1927)(noting that “unnecessary or improper conduct” of mining operation could overcome waiver for damages to surface).

Essentially, the parties to an easement (and liability waiver) are still expected to operate reasonably. For example, in *Johnson v. Pocahontas Coal Co., Inc.*, the landowners sought recovery for damages resulting to their residence as a result of a coal company’s surface mining, drilling and blasting operations. *Id.* The coal company moved for summary judgment, arguing that the landowners had waived any claim for property damage by virtue of an exculpatory provision in the deed. Although the Court acknowledged the waiver, the Court observed that the plaintiffs might be able to demonstrate the defendant had conducted itself in a negligent, careless and reckless manner and denied summary judgment. *Id.* at 270-271. (“[T]he clauses may not be raised as a complete shield from all liabilities which may be indicated by evidence showing defendant’s violations of rules, regulations and laws, its willful, wanton and reckless actions and conduct, or its creation of hazardous or nuisance conditions incident to its strip mining operations causing the injuries and damages set forth in plaintiffs’ complaint.”).⁵

⁵ Similarly, West Virginia law has consistently provided that exculpatory provisions within deeds do not insulate a party from willful, wanton or oppressive conduct. An exculpatory agreement “will not be construed to include the loss or damage resulting from the defendant’s intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff’s intention.” *Murphy v. North American River Runners, Inc.*, 186 W. Va. 310, 316, 412 S.E.2d 504, 510 (W.V. 1991). *See, e.g., Continental Coal co. v. Connellsville By-Product Coal Co.*, 104 W.V. 44, 138 S.E. 737 (1927)(noting that “unnecessary or improper conduct” of mining operation could overcome waiver for damages to surface); *Stamp v. Windsor Power House Coal Company*, 154 W. Va. 578, 584, 177 S.E.2d 146, 150 (W.V. 1970)(indicating disagreement with 1905 case (*Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S.E. 24 , that a surface owner could not recover for a willful or wanton act of those who were producing coal which they owned beneath the surface of the plaintiff’s land); *Johnson v. Pocahontas Cola. Co., Inc.*, 160 W. Va. 261, 270, 234 S.E.2d 309, 314 (W. Va. 1977)(finding exculpatory provision “may not be raised as a complete shield from all liabilities which may be indicated by evidence showing defendant’s violation of rules, regulations and laws, its willful, wanton and reckless actions and conduct...”).

The *Johnson* court partially based its decision to deny summary judgment on *Mullins v. Beatrice Pocahontas Co.*, 432 F.2d 314 (4th Cir. 1970). In the *Mullins* case, Virginia landowners were seeking damages for coal dust emissions that had been deposited on their land from a nearby mining operation. The coal company tried to escape liability by citing a waiver contained within the landowners' deeds that waived any claim related to pollution of air or the emission of dust, smoke, fumes or noxious gases. *Id.* at 318. The *Mullins* Court concluded that despite the exculpatory provision, the defendant coal company still had an obligation to operate reasonably, and, as such, the company could "emit only that amount of coal dust reasonably necessary to produce marketable coal" and could not "impose on these property owners the cost of its pollution if means of collecting the dust are reasonably available." *Id.* at 319-320. The Court reversed summary judgment in favor of the operator and remanded for a factual determination of whether the company's activity was "reasonably necessary for the production of coal in the ordinary manner, or whether it has been caused by improper operating procedures or ineffective equipment." *Id.* at 320.

Just as in *Mullins*, the plaintiff class/petitioners seek damages for the emissions that have been deposited on their land from the nearby zinc plant. The Court concluded that the waiver contained with the landowners' deeds barred all property damage claims related to the emission of any substance. In contravention of West Virginia law, the Court failed to except from this waiver any claims of property damage resulting from the plant owners' negligent and/or reckless operation of the zinc plant.

- C. **The trial court failed to address whether, or erroneously concluded that, the exculpatory provisions permitting perpetual contamination of hazardous and carcinogenic heavy metals do not violate public policy.**

Like most states, West Virginia scrutinizes exculpatory provisions appearing in contracts. In fact, West Virginia's Supreme Court of Appeals has warned that exculpatory provisions must be examined closely for unconscionability, particularly where rights, remedies, and protections that exist for the public benefit are involved. *Dunlap v. Berger*, 211 W. Va. 549, 558, 567 S.E.2d 265, 274 (W. Va. 2002). The welfare of the general public supersedes the right to contract. *Wellington Power Corp. v. CAN Surety Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (W. Va. 2005). Whether a particular contract violates public policy is a question of law which the court must decide in light of the particular circumstances of each case. *Id.* at 686 (quoting *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325, 325 S.E.2d 111, 114 (1984)). In this instance, the trial court failed to determine whether, as a question of law, the exculpatory provisions at issue in this case are run afoul of public policy because they enable the defendants to engage in illegal conduct—i.e., improperly disposing of hazardous waste.

“[T]here is no absolute rule by which courts may determine what contracts contravene the public policy of the state. The rule of law most generally stated is that public policy is that principle of law which holds that no person can lawfully do that which had a tendency to be injurious to the public or against the public good... even though no actual injury may have resulted therefrom in a particular case to the public.” *Id.* The sources that determine our public policy include: federal and state constitutions, statutes, judicial decisions, common law, and “the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people” for whom government is established. *Id.*

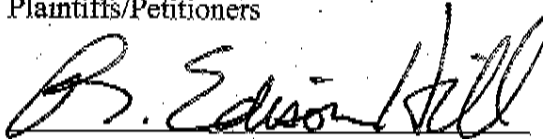
In the instant action, there are two competing public policies: the right to contract and the need to protect the health and welfare of the general public. DuPont sought and the trial court awarded immunity for doing precisely that which the government has forbidden: improperly disposing of its emissions and waste products. From 1971 through 1998, the West Virginia Department of Environmental Protection and the United States Environmental Protection Agency recorded numerous emissions violations from the zinc plant—emissions that threatened the health and welfare of the community. *See* Bernard Reilly's Inspections/Observations Summaries (Exhibit 21 to Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment). The trial court failed to consider whether, as a matter of law, or erroneously concluded without explanation that, the exculpatory provisions allowing for the unfettered right to contaminate a neighbor's property is conscionable and consistent with public policy.

CONCLUSION

WHEREUPON, based upon the foregoing, the Petitioners/Plaintiffs respectfully request that this Honorable Court hear this appeal and reverse the September 14, 2007, and September 20, 2007, Orders dismissing the Property Class members' claims and request that this matter be remanded to the lower court for reinstatement and adjudication of the claim upon its merit.

Respectfully submitted,

Plaintiffs/Petitioners



R. Edison Hill (WV Bar I.D. #1734)

HILL, PETERSON, CARPER, BEE

& DEITZLER, PLLC

500 Tracy Way

Charleston, West Virginia 25311-1261

(304)345-5667

Perry B. Jones, WVSB# 9683

Gerald E. Jones, WVSB# 1920

West & Jones

360 Washington Ave

Clarksburg, WV 26302

(304) 624-5501

Gary W. Rich, WVSB #3078

Law Office of Gary W. Rich, L.C.

212 High Street, Suite 223

Morgantown, WV 26505

(304) 292-1215

J. Farrest Taylor, Esq.

Cochran, Cherry, Givens, Smith,

Lane & Taylor, P.C.

163 West Main Street

Dothan, AL 36301

(334) 793-1555

Michael Papantonio, Esq.

Levin, Papantonio, Thomas, Mitchell,

Eschsner & Proctor, P.A.

316 S. Baylen Street, Suite 400

Pensacola, FL 32502

(850) 435-7074

Robert F. Kennedy, Jr., Esq.

Kennedy & Madonna, LLP

48 Dewitt Mills Rd

Hurley, NY 12443

(845) 331-7514

**IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA**

LENORA PERRINE, CAROLYN HOLBERT,
WAUNONA MESSINGER CROUSER, REBECCA
MORLOCK, ANTHONY BEEZEL,
MARY MONTGOMERY, MARY LUZADER,
TRUMAN R. DESIST, LARRY BEEZEL, and
JOSEPH BRADSHAW, individuals residing in West Virginia,
on behalf of themselves and all others similarly situated,

Plaintiffs/Petitioners,

vs.

Case No. 04-C-296-2
(Honorable Thomas A. Bedell)

E.I. DU PONT DE NEMOURS AND COMPANY,
a Delaware corporation doing business in West Virginia,
MEADOWBROOK CORPORATION, a dissolved
West Virginia corporation, MATTHIESSEN &
HEGELER ZINC COMPANY, INC., a dissolved Illinois
corporation formerly doing business in West Virginia, and
T. L. DIAMOND & COMPANY, INC.,
a New York corporation doing business in West Virginia,

Defendants/Respondents.

CERTIFICATE OF SERVICE

I, R. Edison Hill, counsel for Plaintiffs, hereby certify that service of Plaintiffs'
Docketing Statement, Petition for Appeal, and Designation of the Record has been made
upon counsel of record via Federal Express for overnight delivery on this 7th day of
March, 2008, addressed as follows:

Jim Arnold, Esq.
Allen, Guthrie, McHugh & Thomas, P.L.L.C.
500 Lee Street, East, Suite 800
Charleston, WV 25301
Counsel for Defendant E. I. Du Pont De Nemours and Company

Richard W. Gallagher, Esq.
Robinson & McElwee, PLLC
140 West Main Street, Suite 300
Clarksburg, WV 26301

Counsel for Defendants T.L. Diamond & Company, Inc. and Joe Paushel

A handwritten signature in black ink that reads "R. Edison Hill". The signature is written in a cursive, flowing style.

R. Edison Hill (WV Bar I.D. #1734)

HILL, PETERSON, CARPER, BEE

& DEITZLER, PLLC

500 Tracy Way

Charleston, West Virginia 25311-1261

(304)345-5667

No. 080721

**DO NOT REMOVE
FROM FILE**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

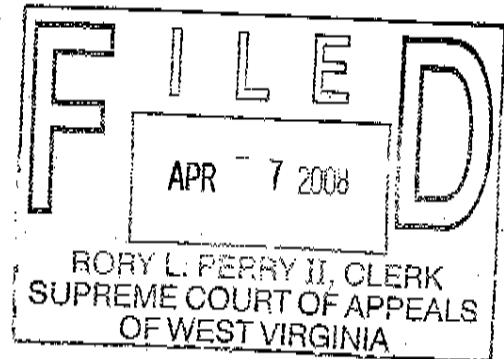
LENORA PERRINE, et al.;

Petitioners,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, et al.,

Respondents.



**RESPONDENT DUPONT'S RESPONSE TO
PETITIONERS' PETITION FOR APPEAL**

David B. Thomas (WV Bar No. 3731)
James S. Arnold (WV Bar No. 0162)
Stephanie D. Thacker (WV Bar No. 5898)
Allen Guthrie McHugh & Thomas, PLLC
500 Lee Street, East, Suite 800
Post Office Box 3394
Charleston, West Virginia 25333-3394
(304) 345-7250

Jeffrey A. Hall (*pro hac vice* pending)
Bartlit Beck Herman Palenchar & Scott LLP
Courthouse Place
54 West Hubbard Street, Suite 300
Chicago, Illinois 60610
(312) 494-4400

Counsel for E.I. du Pont de Nemours and Company

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF FACTS	3
ARGUMENT	8
I. THE CIRCUIT COURT PROPERLY ENFORCED THE UNAMBIGUOUS TERMS OF THE GRASSELLI DEEDS	8
II. PETITIONERS' ASSIGNED ERRORS ARE MERITLESS	11
A. "The Contemplation of the Parties" Does Not Bar Enforcement of the Deeds.....	11
B. Labeling the Alleged Conduct "Unreasonable" Does Not Bar Enforcement of the Deeds.....	15
C. Public Policy Favors Enforcing Settlements Like Those in the Grasselli Deeds.....	19
CONCLUSION.....	22

TABLE OF AUTHORITIES**Federal Cases**

<i>FCA Assocs. v. Texaco, Inc.</i> , No. 03-CV-6083T, 2005 U.S. Dist. Lexis 6348 (W.D.N.Y. Mar. 31, 2005).....	20, 21
<i>Mullins v. Beatrice Pocahontas Co.</i> , 432 F.2d 314 (4th Cir. 1970).....	16

State Cases

<i>Albahary v. City of Bristol</i> , 886 A.2d 802 (Conn. 2005).....	20
<i>Bartlett v. Grasselli Chem. Co.</i> , 92 W. Va. 445, 115 S.E. 451 (1922).....	5, 14
<i>Continental Coal Co. v. Connellsville By-Product Coal Co.</i> , 104 W. Va. 44, 138 S.E. 737 (1927).....	16
<i>Dunlap v. Berger</i> , 211 W. Va. 549, 567 S.E.2d 265 (2002).....	20
<i>Horkulic v. Galloway</i> , Nos. 33352 & 33353, 2008 W. Va. Lexis 8 (Feb. 19, 2008).....	19
<i>Johnson v. Junior Pocahontas Coal Co., Inc.</i> , 160 W. Va. 261, 234 S.E.2d 309 (1977).....	16, 17
<i>Lyon v. Grasselli Chem. Co.</i> , 106 W. Va. 518, 146 S.E. 57 (1928).....	5
<i>McDonough Co. v. E.I. DuPont DeNemours & Co.</i> , 167 W. Va. 611, 280 S.E.2d 246 (1981).....	9
<i>Murphy v. N. Am. River Runners, Inc.</i> , 86 W. Va. 310, 422 S.E.2d 504 (1991).....	16
<i>Pocahontas Land Corp. v. Evans</i> , 175 W. Va. 304, 332 S.E.2d 604 (1985).....	9, 11
<i>Quintain Dev., LLC v. Columbia Natural Res., Inc.</i> , 210 W. Va. 128, 556 S.E.2d 95 (2001).....	10

<i>Russell v. Island Creek Coal Co.</i> , 182 W. Va. 506, 389 S.E.2d 194 (1989).....	12
<i>Sanders v. Roselawn Mem'l Gardens</i> , 152 W. Va. 91, 159 S.E.2d 784 (1968).....	19
<i>Stamp v. Windsor Power House Coal Co.</i> , 154 W. Va. 578, 177 S.E.2d 146 (1970).....	13, 20
<i>Wellington Power Corp. v. CAN Sur. Corp.</i> , 217 W. Va. 33, 614 S.E.2d 680 (2005).....	9, 20

State Rules

W. Va. R. Civ. P. 50(b).....	2
W. Va. R. Civ. P. 59	2
W. Va. R. Civ. P. 72	2
W. Va. R. Evid. 404(b).....	2

Other

Verdict Search, <i>Top 100 Verdicts of 2007</i> , < http://www.verdictsearch.com/index.jsp?do=top100 > (last visited Apr. 1, 2008).....	1
---	---

INTRODUCTION

Petitioners in this case prevailed in a class action in which they were awarded \$55 million in remediation damages, medical monitoring that they and the Circuit Court value at \$130 million, and punitive damages of \$196.2 million. This was the largest verdict of its kind in 2007—not only in West Virginia, but also in the United States. *See Verdict Search, Top 100 Verdicts of 2007*, available online at <http://www.verdictsearch.com/index.jsp?do=top100> (last visited Apr. 5, 2008).

Despite the amounts they were awarded (and the dozens and dozens of rulings favorable to them that paved the way for their record-setting judgments), Petitioners here seek review and reversal of one narrow, summary judgment ruling that did not go their way. That ruling applied unambiguous releases and easements to a subset of the claims of a fraction of the class members. The Circuit Court's ruling correctly dismissed the property-damage claims of those class members whose chain of title contained releases of (and perpetual easements to) DuPont, through its predecessor in interest. The Circuit Court's ruling was based on the plain meaning of the releases and easements, established law, and the public policy in favor of enforcing arms-length settlement agreements. The ruling implicates no recurring legal issues that necessitate resolution by this Court. Instead, Petitioners simply quibble with the Circuit Court's case-specific application of the unambiguous terms of releases and easements entered into roughly 80 years ago.

By contrast, DuPont, the real loser below, will be seeking review of the record judgments against it by its June 24, 2008, filing deadline.¹ Those judgments resulted from numerous, significant Circuit Court errors before trial, during trial, and during the post-trial proceedings. These errors—which implicate important, recurring issues on which the trial courts of this State need detailed and clear guidance—include, but are not limited to:

- The Circuit Court permitted Plaintiffs to present to the jury allegations of other misconduct by DuPont without complying with the requirements of West Virginia Rule of Evidence 404(b).
- The Circuit Court excluded evidence critical to DuPont's defense, including all evidence pertaining to DuPont's statute of limitations defense.
- The Circuit Court committed numerous prejudicial errors relating to the punitive damages phase of trial, including (i) allowing Plaintiffs to seek punishment for DuPont's First Amendment-protected lobbying of government officials; (ii) upholding the jury's finding of punitive liability even though DuPont's historical operations of the Spelter smelter met or exceeded prevailing industry standards at the time and there was no evidence of the kind of egregious misconduct necessary to support imposition of punitive damages under West Virginia or federal law; and (iii) holding that the record punitive award was not excessive under West Virginia law and the Due Process Clause notwithstanding the absence of any showing that any award beyond the already massive compensatory verdicts was necessary to punish and deter and despite the fact that the award exceeds the highest civil penalties ever imposed by the State of West Virginia and the regional EPA authority by over \$190 million.
- The Circuit Court erroneously adopted Plaintiffs' proposed medical monitoring plan in its entirety, including biennial CT scans.
- The Circuit Court violated DuPont's due process rights by certifying two classes after finding that the claims of the named plaintiffs are typical of those of the class members but then refusing to allow DuPont to introduce evidence specific to the

¹ DuPont timely filed post-trial motions for judgment under Rule 50(b) of the West Virginia Rules of Civil Procedure and for a new trial under Rule 59 of the West Virginia Rules of Civil Procedure. The Circuit Court denied these motions in orders entered on February 25, 2008. Under Rule 72, the time for DuPont to file its Petition(s) for appeal commences to run and is to be computed from the entry of those orders. DuPont will seek this Court's review on or before June 24, 2008.

named plaintiffs on the ground that this is a class action and evidence related to the named plaintiffs therefore is not relevant.

The Petition(s) that DuPont will file will explain in detail why errors such as these require this Court to reverse the Circuit Court.

Given the importance of this case, the magnitude of the verdicts and post-trial medical-monitoring valuation, and the enormity of the Circuit Court's errors, DuPont will urge this Court to grant DuPont's Petition(s). None of these rationales apply to Petitioners' Petition, however.

The Court should deny the pending Petition because it assigns only meritless errors relating to a single, narrow Circuit Court ruling that correctly applied unambiguous releases and easements to one subset of claims of a fraction of the class members.

STATEMENT OF FACTS

DuPont owned and operated a zinc smelting facility in Spelter, West Virginia, from 1928 to 1950. During its ownership, DuPont operated at the site consistent with the highest contemporary industry standards.

In 1996, when the U.S. Environmental Protection Agency ("EPA") and the West Virginia Department of Environmental Protection ("DEP") raised environmental concerns about the smelter site, DuPont worked with EPA, DEP, and the then-owners of the smelter to remediate the site, even though DuPont had not operated the smelter for 46 years. In 2001, DuPont took ownership of the property and assumed sole responsibility for the remediation. By the time it completed the remediation, DuPont spent approximately \$18 million to meet all of the oversight agencies' requirements. The property is now a green, open space, ready for appropriate economic redevelopment.

In 2004, more than 50 years after DuPont sold the plant, Petitioners brought a class action lawsuit against DuPont alleging off-site property damage, the need for medical monitoring, and an entitlement to punitive damages based on their alleged exposure to arsenic, cadmium, and lead from the plant. Petitioners brought no personal-injury claims. The Circuit Court certified two separate class actions against DuPont: one for property-damage claims and one seeking medical monitoring.

On October 1, 2007, a jury found DuPont liable under theories of negligence, nuisance, trespass, and strict liability. In subsequent phases of the trial, that jury awarded medical monitoring to all medical monitoring class members (with the scope, duration, and cost of monitoring reserved for post-trial proceedings), awarded more than \$55 million in property-remediation damages to the property class, and awarded \$196.2 million in punitive damages to both classes. In post-trial medical-monitoring proceedings, the Circuit Court adopted Petitioners' proposed monitoring program in its entirety and estimated the value of that 40-year program to be roughly \$130 million.

Petitioners seek review of one narrow part of one Circuit Court order.² Specifically, Petitioners challenge the Circuit Court's decision to grant DuPont's Motion for Summary Judgment concerning the effect of releases and easements that apply to a fraction of the properties in the class area.³ The Circuit Court held that the releases and easements barred the

² The Circuit Court signed two different forms of order concerning DuPont's Motion for Summary Judgment. Petitioners' counsel prepared one order. *See* Order Granting in Part and Denying in Part DuPont's Mot. for Summ. Judgment (Sept. 14, 2007) (attached to Petitioners' Docketing Statement). DuPont's Counsel prepared the other order. Though the two orders differ in other respects, Petitioners are correct that the orders are substantively the same on the sole issue that is the subject of this Petition. Pet. at 2 n.1.

³ The parties agree on which properties are subject to the releases and easements. (*See* 10/11/07 Trial Tr. at 4896-97 (Petitioners' counsel: "We have agreed that the list accurately describes the

property claims, but not the medical monitoring claims, of class members who have releases and easements in their chain of title. Petitioners estimate that the releases and easements cover approximately 265 of the structures in the approximately seven-mile-by-five-mile Class Area. Pet. at 1.

Many of the facts underlying the Petition are not in dispute. Grasselli Chemical Company (“Grasselli”) originally built the zinc smelter. *Id.* at 3. Grasselli owned and operated the plant from approximately 1911 until 1928. *Id.* During Grasselli’s tenure at the smelter, owners of real property near the plant filed over 40 cases against Grasselli. The property owners sued Grasselli for “injury to the agricultural, residential and market values” of their properties “by reason of chemical deposits upon it from fumes, gases, and dust emitted from [Grasselli’s] furnaces and carried over the land by air currents, or spreading over it through the air.” *Bartlett v. Grasselli Chem. Co.*, 92 W. Va. 445, 446-47, 115 S.E. 451, 451 (1922). The cases included claims for nuisance and trespass. *See, e.g., id.; Lyon v. Grasselli Chem. Co.*, 106 W. Va. 518, 146 S.E. 57 (1928).

In 1928, DuPont purchased Grasselli. DuPont (through Grasselli) replaced the horizontal retort furnaces with vertical retorts, dramatically reducing the facility’s environmental impact. (9/24/07 Trial Tr. at 2924-26.) After the change in ownership, the complaints from the Spelter community that had characterized the smelter’s early operations ended almost immediately. (*Id.*)

In the 1930s, Grasselli and the property owners settled the remaining claims and lawsuits. Pet. at 1. As part of the settlements, many of the property owners entered into broad releases and granted easements that were memorialized in deeds (“Grasselli Deeds”) that ran with the land

properties covered by the Grasselli releases.”); 10/12/07 Trial Tr. at 4993-95 (marking list of properties covered by Grasselli Deeds as DuPont Trial Exhibit 5112).)

and were recorded in the Office of the Clerk of the County Commission of Harrison County. *Id.* at 1, 4; Order Granting in Part and Denying in Part DuPont's Mot. for Summ. Judgment at 5-6 (Sept. 14, 2007) (attached to Petitioners' Docketing Statement) ("Order").

The Grasselli Deeds released Grasselli, as well as successors and assigns of Grasselli, such as DuPont, from the property claims of the individual Plaintiffs who are successors in title to the grantors of those deeds.

The Grasselli Deeds released all plant owners from, among other things, all past, present, and future claims that the property owners may have for injuries to their land resulting from the existence or operation of the zinc plant or from any substance that the plant produces in the zinc process. Specifically, the deeds provide that all plant owners are released from

all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands, in law or equity, which said [property owners], or any of them, ever had or now have, or which they, or any of them, or the heirs, personal representatives or assigns of them, or any of them, hereafter can, shall, or may have against said [plant owner and operator] or either of them, or the successors and assigns of them or either of them, for or by reason of any and all injuries, damages and/or losses of every kind whatsoever, to [their] land, . . . the productivity and/or products of said land, and/or any property or thing, real, personal or mixed, therein or thereon . . . which have been caused, arisen or resulted, or are caused, arise or result or hereafter may or shall be caused, arise or result from, by reason or out of said plant or the past, present or future existence . . . or operation of said plant, or any substance or substances in the past, present or future produced, discharged, emanating, cast, precipitated or escaping therefrom . . . The substance or substances hereinbefore and elsewhere in this deed mentioned do and shall include and extend to any and all solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters and things which have been, are or hereafter may or shall be produced, discharged, emanated, cast or precipitated, or did, do or shall escape, by or from said plant in, about or by reason of the manufacture, smelting, extraction or production of zinc or any product thereof or any composition of matter or other article consisting or partly consisting of the same, or anything used or acquired for use in, about, or for said manufacturing, smelting, extraction and/or production.

(Resp. Exh. A at DPZ0030774 (emphases added).)

The Grasselli Deeds also grant perpetual easements to the plant owners and operators that allow for the discharge of the specified substances from the plant over and onto the property owners' land:

And for the consideration aforesaid, said [property owner] does hereby grant and convey to [plant owner] and its successors and assigns forever, the **full, free and perpetual right . . . to produce, discharge, emanate, cast, precipitate and cause or permit to escape the aforesaid substance or substances therefrom and over, on and/or onto said land of [property owners] or any property or thing, real, personal or mixed, therein or thereon, without any compensation** except the above recited consideration already received as aforesaid, and free, acquit and released from any and all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands of or by said [property owners], or any of them, or the heirs, personal representatives or assigns of them or any of them, said [property owners], for themselves, and each of them, and the heirs, personal representatives and assigns of them and each of them, hereby releasing any and all such actions, causes of action, suits, liabilities, damages, claims, debts and/or demands.

(*Id.* at DPZ0030774-75 (emphases added).)

Finally, the Grasselli Deeds expressly stated that the releases and easements run with the land and that they bind not only the original parties to the agreements (that is, Grasselli and the then-existing property owners), but also all of their successors and assigns. (*Id.* at DPZ0030775.) The deeds provide that

the grants, releases, rights, easements, restrictions, covenants and agreements . . . **shall run with said land and the title thereto and shall bind said land, said [property owners], and the heirs, personal representatives and assigns of them and each of them, and every subsequent owner, possessor or occupant of said land, or any part thereof, and shall inure to the benefit of said [plant owner and operator] and each of them, and the successors and assigns of them and each of them forever.**

(*Id.* (emphases added).) Petitioners do not dispute that the Grasselli Deeds run with the land.

Pet. at 1.

In September 2007, the Circuit Court held that the “release and easement provisions of the Grasselli Deeds are binding and enforceable upon the individual Plaintiffs in this action who are successors in title to the grantors of the Grasselli Deeds.” Order at 8. The Circuit Court therefore dismissed the “property damage claims of those Plaintiffs who are the successors in title to the Grasselli Deeds.” *Id.*

Although DuPont argued that the Grasselli Deeds were broad enough to bar all claims (including medical monitoring) brought by Plaintiffs who are successors in title to the grantors of the Grasselli Deeds, the Circuit Court expressly limited the effect of the deeds to bar only property class claims. *Id.* at 2 n.1, 8. The Circuit Court’s order thus had no effect on any Plaintiff’s medical monitoring claim.

ARGUMENT

The Circuit Court correctly enforced the unambiguous terms of the releases and easements contained in the Grasselli Deeds. Petitioners seek to have this Court overturn the Circuit Court’s order on legally erroneous grounds that would set a dangerous precedent for the validity of settlements and releases in this State.

I. THE CIRCUIT COURT PROPERLY ENFORCED THE UNAMBIGUOUS TERMS OF THE GRASELLI DEEDS

The Grasselli Deeds’ clear language bars the claims of members of the property class who are successors in title to the grantors of the deeds. The deeds expressly preclude any property claims premised on the release of substances from the plant onto properties subject to the releases and easements.

“Where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and,

ordinarily, will not resort to parol[] or extrinsic evidence.” *Pocahontas Land Corp. v. Evans*, 175 W. Va. 304, 308, 332 S.E.2d 604, 609 (1985); *see also McDonough Co. v. E.I. DuPont DeNemours & Co.*, 167 W. Va. 611, 613, 280 S.E.2d 246, 247 (1981) (“Deed words that are not ambiguous should not be construed. . . . Parties are bound by general and ordinary meanings of words used.”). In other words, a “valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation.” *Wellington Power Corp. v. CNA Sur. Corp.*, Syl. Pt. 1, 217 W. Va. 33, 614 S.E.2d 680 (2005).

The Grasselli Deeds contain “definite and unambiguous language.” *Pocahontas Land Corp.*, 175 W. Va. at 308, 332 S.E.2d at 609. They expressly (a) release past, present, and future claims arising out of either the operation of the plant or the discharge of substances from the plant, and (b) grant a perpetual easement in favor of the plant owner to operate the plant and to discharge substances from the plant over and on the property owners’ land. The deeds thus preclude any property claims premised on the release of substances from the plant onto properties subject to the releases and easements.

The deeds’ language could not be more definitive. The releases and easements that the original property owners granted were, on their face, intended to cover property claims like the ones Petitioners brought in this case.⁴ The Grasselli Deeds released Grasselli and its successors and assigns “from all actions, causes of action, suits, liabilities, damages, claims, debts and/or

⁴ Petitioners’ claims stem from alleged emissions or discharges related to DuPont’s operation of the zinc smelter. *See, e.g.*, Second Am. Compl. ¶ 3 (“The real properties of Plaintiffs and other area residents have been contaminated with hazardous substances contained within dust, smoke, and/or other releases from the Spelter Smelter facility.”). Although DuPont denies this allegation, the unequivocal language of the Grasselli Deeds expressly permitted DuPont to make such emissions and discharges on the land of the property owners whose real property includes a Grasselli Deed in the chain of title.

demands . . . which said [property owners] . . . hereafter can, shall, or may have against said [plant owner and operator].” (Resp. Exh. A at DPZ0030774.) The deeds describe those past, present, and future lawsuits as including lawsuits “for or by reason of any and all injuries, damages and/or losses of every kind whatsoever, to [property owners’] land, . . . which have been caused, . . . or hereafter may or shall be caused, . . . by . . . the past, present or future existence . . . or operation of said plant, or any substance or substances in the past, present or future produced . . . therefrom.” (*Id.*) These “substances” “include . . . any and all solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters and things which have been, or hereafter may or shall be produced . . . by or from [the zinc] plant.” (*Id.*)

At the same time, the property owners granted Grasselli and its successors and assigns an easement granting them “forever, the full, free and perpetual right . . . to produce, discharge, emanate, cast, precipitate and cause or permit to escape” “any and all” substances generated through the “manufacture, smelting, extraction, or production of zinc or any product thereof.” (*Id.* at DPZ0030774-75.)

It is well established that “an affirmative easement entitles the owner thereof to use the land subject to the easement by doing acts which, were it not for the easement, he would not be privileged to do.” *Quintain Dev., LLC v. Columbia Natural Res., Inc.*, 210 W. Va. 128, 135, 556 S.E.2d 95, 102 (2001). “[A]n easement allows a person to engage in activities on another’s land that, in the absence of the easement, would be a nuisance.” *Id.* “In circumstances where, as here, an easement authorizes activity to be engaged in *upon* the servient property, it is generally considered that the easement authorizes a trespass.” *Id.*

The unambiguous language of the Grasselli Deeds expressly allows for the discharge of the products and by-products of the plant's operation over and onto the lands of Petitioners who are successors in title to the grantors of the deeds. The deeds were the product of litigation and negotiation in which the property owners were represented by counsel. They are not susceptible to any narrower reading that would render them inapplicable to this case. The Circuit Court thus correctly dismissed the property claims of Plaintiffs who are successors in title to the grantors of the deeds.

II. PETITIONERS' ASSIGNED ERRORS ARE MERITLESS

A. "The Contemplation of the Parties" Does Not Bar Enforcement of the Deeds

Petitioners' first assignment of error is that the Circuit Court "disregarded evidence" that the releases and easements "exceeded the contemplation of the parties at the time of execution." Pet. at 7. They say that, at the time the parties executed the deeds, the landowners did not contemplate the discharge of the specific pollutants at issue in this case. *Id.* at 7-8.

This argument ignores that the best evidence of the parties' contemplation is the text of the deeds. This is especially so where, as here, the asserted "contemplation" occurred roughly 70 years ago. As discussed above, the Grasselli Deeds unambiguously release past, present, and future property claims arising out of the operation of the plant and grant a perpetual easement to operate the plant and to allow the future discharge of substances from the plant. Accordingly, under this Court's precedent, *e.g.*, *Pocahontas Land Corp.*, 175 W. Va. at 308, 332 S.E.2d at 609, there is no basis for considering extrinsic evidence of "the contemplation of the parties." Petitioners cite no extrinsic evidence that suggests the parties contemplated a release less expansive than the plain language of the deeds provides.

Petitioners cite *Russell v. Island Creek Coal Co.*, 182 W. Va. 506, 389 S.E.2d 194 (1989), for the proposition that a waiver in a deed must be one that is within the parties' contemplation. Pet. at 7-8. But *Russell* only confirms that the text of the deed is the most reliable evidence of the parties' contemplation. The Court in *Russell* examined the plain meaning of the deed language at issue, compared it to the claimed waiver, and determined that the claimed waiver was within the scope of that deed language. 182 W. Va. at 516-17, 389 S.E.2d at 204-05. Similarly here, there is nothing in the language of the Grasselli Deeds to suggest that their broad release and easement provisions do not mean what they say—that the landowners were releasing claims arising out of any property damage caused by “any substance or substances in the past, present or future produced, discharged, . . . or escaping” from the plant. (Resp. Exh. A at DPZ0030774.)

In no uncertain terms, this language evidences the parties' intent to bar claims arising out of future pollution, including pollution that the parties did not contemplate, or could not have contemplated, with any specificity at the time of execution. The deeds expressly release “any and all” future claims arising out of alleged damage caused by pollutants unknown to the parties at the time of execution. (*Id.* at DPZ0030774.) They leave no room for doubt about the breadth of “substances” to which they were intended to apply: “The substance or substances hereinbefore and elsewhere in this deed mentioned do and shall include and extend to *any and all* solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters and things which have been, are or hereafter may or shall be produced, discharged, emanated, cast or precipitated” from the plant in connection with the operation of a zinc smelter. (*Id.* (emphasis added).)

The use of the word "all" here is particularly significant. This Court has explained that "all" is a "magic word" in the context of easements and anticipatory releases, holding that its use connotes the desire to "waive or exclude the [entire] benefit of a rule of law" that would otherwise apply. *Stamp v. Windsor Power House Coal Co.*, 154 W. Va. 578, 583, 177 S.E.2d 146, 149 (1970) (internal quotation marks omitted). The contract at issue in *Stamp* gave the defendant the right to remove "all the coal" in a particular seam. 154 W. Va. at 580, 177 S.E.2d at 147-48. The Court held that the word "all" constituted an express waiver of the grantor's right of lateral and subjacent support for the surface land. 154 W. Va. at 582-83, 177 S.E.2d at 148.

Here, too, because the language of the deeds unambiguously covers "all" substances emanating from the plant at the time of the grant and in the future, it is irrelevant that lead, arsenic, and cadmium are not specifically mentioned in the deed, or that the parties may or may not have specifically "contemplated" those particular substances, or the specific attributes of those particular substances, at the time of the grant. Contrary to Petitioners' claim, nothing in the releases turns on the nature of the pollutant, such as whether its effects can be "neutralized with fertilizer," Pet. at 3, whether it constitutes a "heavy metal[]," *id.* at 4 n.3, or whether it is arsenic, cadmium, or lead, as opposed to zinc.

Equally unavailing is Petitioners' assertion that because the Grasselli litigation was about harm to the "productivity and fertility" of the farmers' land, the Court should limit the Grasselli Deeds to such harms. *Id.* at 4. The deeds are not so limited. They release Grasselli and its successors and assigns from causes of action for "any and all" property damages "of every kind whatsoever," which include damages not only to the "productivity and/or products of said land," but also to "any property or thing, real, personal, or mixed, therein or thereon." (Resp. Exh. A at

DPZ0030774.) The express language of the deeds shows that the landowners released Grasselli, and hence DuPont, from causes of action that go far beyond those asserting harm to the “productivity and fertility” of the land.

Finally, Petitioners’ claim that the so-called Bear and Morgan report⁵ was “hidden” from landowners who executed the Grasselli Deeds is false. Pet. at 6. The landowners in the Grasselli litigation were aware of this report years before the Grasselli Deeds were executed and recorded. In 1920, these landowners moved to compel production of the report, but the Circuit Court of Harrison County denied their motion. *Bartlett v. Graselli Chem. Co.* (Cir. Ct. Harrison Cty. 1920) (attached as Resp. Exh. B).

The facts undercut any insinuation that there has been a continuing attempt to “hide” this report. DuPont provided a copy of the report to the EPA and DEP during DuPont’s remediation of the Spelter site. (9/18/07 Trial Tr. at 2210-13.) And DuPont provided the report to the Petitioners in this litigation. (*Id.*)

In any event, the Bear and Morgan report is irrelevant to the enforceability of the Grasselli Deeds. The releases and easements contained in the deeds are in no way conditioned on the disclosure of information—especially information that neither Grasselli nor DuPont had any obligation to disclose at the time.

Finally, there is no reason to think that disclosure of the report would have made a difference in the negotiation of the releases. Based on Petitioners’ own description, the report contained no new information. Petitioners describe the report as “confirm[ing] that plant

⁵ In 1919, Firman E. Bear and Francis M. Morgan investigated the impact on local crops and livestock of zinc from the Grasselli horizontal retorts. Bear and Morgan memorialized their findings in a report titled *Meadowbrook Investigation 1919*.

emissions were poisoning livestock and injuring and killing extensive areas of vegetation.” Pet. at 5. The landowners who agreed to the Grasselli releases leveled this same allegation in their lawsuits: harm to “the fertility of the land and the health of livestock.” *Id.* at 4. Petitioners state in their Petition that “this report addressed the very claims being brought by the 1920s plaintiffs.” *Id.* at 6. It makes no sense to suggest, more than 80 years after the fact, that a report that at most confirmed what the landowners already believed should undo settlement agreements that those landowners entered into to bring their claims against Grasselli to a mutually agreeable resolution.

B. Labeling the Alleged Conduct “Unreasonable” Does Not Bar Enforcement of the Deeds

Petitioners’ second assignment of error is that the Circuit Court “failed to address” whether the Grasselli Deeds are effective with respect to conduct Petitioners say is “unreasonable.” *Id.* at 8.

As a legal matter, the “reasonableness” of DuPont’s conduct is irrelevant to whether the Grasselli Deeds are effective and enforceable. The deeds are enforceable by their terms, regardless of whether the plant operator acted reasonably. The language of the deeds bars “all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands, in law or equity,” not merely actions arising out of reasonable conduct. (Resp. Exh. A at DPZ0030774.) The deeds include releases of actions based on “any and all injuries, damages and/or losses of every kind whatsoever” to the property. (*Id.*) The deeds apply to actions based on “the past, present or future existence . . . or operation of said plant, or any substance or substances in the past, present or future produced, discharged, emanating, cast, precipitated or escaping therefrom.” (*Id.*)

West Virginia law is clear: an unambiguous contractual waiver or release of liability is enforceable regardless of the “reasonableness” of the latitude that it gives to the grantee. *See, e.g., Murphy v. N. Am. River Runners, Inc.*, 86 W. Va. 310, 314-15, 422 S.E.2d 504, 508-09 (1991); *Continental Coal Co. v. Connellsville By-Product Coal Co.*, 104 W. Va. 44, 56, 138 S.E. 737, 742 (1927) (“Where the meaning of a contract is clear, a court will not change its terms, in order to relieve a party thereto, because the contract is harsh and unreasonable.”). As this Court has explained, “[c]ompensation for an injury to property is a proper matter of contract, and there is no reason why such injury may not be compensated by contract as well as by a verdict of a jury or decree of a court.” *Continental Coal*, 104 W. Va. at 56, 138 S.E. at 741.

In arguing for a contrary rule, Petitioners rely on *Johnson v. Junior Pocahontas Coal Co., Inc.*, 160 W. Va. 261, 234 S.E.2d 309 (1977), which in turn cites *Mullins v. Beatrice Pocahontas Co.*, 432 F.2d 314 (4th Cir. 1970), to support their assertion that the Court must read a “reasonableness” limitation into the clear Grasselli Deed language. Pet. at 9-10. But *Johnson* involved deed language very different from the Grasselli Deeds.

In *Johnson*, New River and Pocahontas Consolidated Coal Company (“New River”) conveyed surface lands to an individual, but retained mining rights in that land. 160 W. Va. at 269, 234 S.E.2d at 313. The deed, unlike the Grasselli Deeds, “obviously contemplated continued use of the surface lands for residential and gardening purposes.” 160 W. Va. at 270, 234 S.E.2d at 314. “[T]he coal lease and mining contract emanating from the severance deed transaction contained indemnity provisions recognizing protective considerations incident to possible claims for damages to the surface land residence properties.” 160 W. Va. at 270, 234 S.E.2d at 314.

New River leased other lands to Consolidated Coal Company (“Consolidated”), which in turn contracted with Junior Pocahontas Coal Company (“Junior Pocahontas”) to mine the land. Under Consolidated’s lease, it was required not only to “conduct its mining operations as not to violate any rights of lateral and subjacent support belonging to the owners of other estates,” 160 W. Va. at 264, 234 S.E.2d at 311, but also to “leave sufficient coal in place to support existing buildings of others on the surface lands,” 160 W. Va. at 269, 234 S.E.2d at 313.

Given the balance struck in the deed and related documents, and all of the protections those documents afforded the landowning plaintiff, the *Johnson* court held that Junior Pocahontas could not use the deed “as a complete shield from all liabilities.” 160 W. Va. at 270, 234 S.E.2d at 314. The Grasselli Deeds contain no analogous provisions favoring the residential landowners—indeed, as explained above, they expressly grant the right to emit “all” by-products of the plant onto the servient lands “forever,” establishing that the landowners retained no rights that could support their claims for property damage now.

As a factual matter, Petitioners fail to specify the “unreasonable” conduct that they think falls outside the terms of the releases and easements. They do not say whether DuPont or other plant owners committed this alleged unreasonable conduct. And they do not explain how any unreasonable conduct is connected to the property-damage claims Petitioners seek to advance. Petitioners have failed to present DuPont, and this Court, with sufficient facts to evaluate their assertion that unreasonable conduct, giving rise to the causes of action they say the Circuit Court incorrectly barred, invalidates the plain text of the deeds.

The only conduct that could bear on the releases is conduct that occurred during the operation of the plant and that resulted in arsenic, cadmium, and lead being deposited onto

Petitioners' property. The record does not support Petitioners' assertion that this conduct was unreasonable.

Petitioners have no basis for saying that operating a zinc plant from 1928 to 1950 according to prevailing industry standards, providing munitions to the U.S. Government during World War II, and employing a town of West Virginia citizens for decades was "unreasonable."

Petitioners rely in their statement of facts on the opinions of Steven Amter, a geologist and hydrogeologist. Pet. at 3 n.2. Over DuPont's objections, the Circuit Court permitted Amter to opine as an expert on broad topics well beyond his expertise, including "the state of knowledge of industries affecting the environment" (9/20/07 Trial Tr. at 2719-20) and "[t]he history of knowledge about arsenic, cadmium and lead regarding their toxicity" (*id.* at 2742).

Amter offered only two examples in support of his opinion that DuPont was negligent. Both involved types of pollution control equipment that DuPont or Grasselli allegedly failed to install to control plant emissions. First, Amter argued that Grasselli should have installed a Cottrell precipitator at the smelter to control pollution. (9/20/07 Trial Tr. at 2753-55, 2757-59.) Second, Amter suggested that DuPont should have used a "bag house" to limit smelter emissions. (*Id.* at 2761-63.) But Amter acknowledged that he was not aware of a single vertical retort zinc smelter that used a bag house as of 1950. (9/24/07 Trial Tr. at 2926.) He also admitted that he was not aware of any zinc smelter that used a Cottrell precipitator during the period of time that Grasselli operated the plant. (*Id.* at 2926-27.)

Amter offered no evidence that would allow a jury to find that DuPont's operation of the smelter was willful, malicious, or intentional. In fact, Amter acknowledged that DuPont had an air pollution control program dating back to at least 1938. (*Id.* at 2858.) Amter further testified

that DuPont was on the cutting edge of pollution control during the middle of the twentieth century. Finally, Amter admitted that the complaints from the Spelter community that plagued Grasselli Chemical Company disappeared after DuPont replaced the horizontal retort furnaces with vertical retorts in 1929. (*Id.* at 2924-26.)

C. Public Policy Favors Enforcing Settlements Like Those in the Grasselli Deeds

Petitioners' final assignment of error is that the Circuit Court rejected Petitioners' argument that public policy precludes enforcing the broad language of the Grasselli Deeds. Pet. at 10-12. The Circuit Court correctly rejected this argument.

First, this is not a personal injury case. Petitioners made that clear to the jury, saying in their opening statement that "[i]f you have an illness and you think it's related to the smelter, then you have to file an individual lawsuit. This class action does not address those personal injuries." (9/12/07 Trial Tr. at 855.) Thus, contrary to Petitioners' suggestion, Pet. at 7, the record in this case does not require the Court to address whether an easement to pollute a community with "heavy metal toxins with devastating human health effects" violates public policy.

Second, public policy favors enforcing the settlements and releases. There is a strong public policy of encouraging parties to resolve contested litigation and to settle claims. *Horkulic v. Galloway*, Nos. 33352 & 33353, 2008 W. Va. Lexis 8 (Feb. 19, 2008). The law favors the resolution of controversies through settlements rather than through litigation, and courts should encourage rather than discourage parties in compromising conflicting claims. *See, e.g., Sanders v. Roselawn Mem'l Gardens*, 152 W. Va. 91, 104, 159 S.E.2d 784, 792 (1968). Failure to enforce the terms of litigation settlements discourages future settlements. Undoing settlements

many decades after they are made, and reading easements out of deeds is contrary to public policy.

As this Court has emphasized, “the freedom to contract is a substantial public policy that should not be lightly dismissed.” *Wellington Power Corp. v. CAN Sur. Corp.*, 217 W. Va. 33, 38, 614 S.E.2d 680, 685 (2005). For that reason, courts

are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.

Id. (internal quotation marks omitted). As the Court stated in *Stamp*, “[i]f, by unambiguous language any specified right is granted or withheld, there is no public policy which defeats its enforcement, even though the public interest may seem to be adversely affected.” 154 W. Va. at 584-85, 177 S.E.2d at 149-50.⁶

These policy concerns do not change merely because the deeds at issue relate to the discharge of substances onto adjoining property. Courts around the country have enforced releases and easements that cover substances considered “pollutants” or “contaminants.” See, e.g., *Albahary v. City of Bristol*, 886 A.2d 802, 805 (Conn. 2005) (recognizing enforceability of easement providing the “right to discharge pollutants to the ground water” and allowing defendant to “release and deposit contaminants and pollution directly or indirectly, into, or in the groundwaters and subsurface soils and formations”); *FCA Assocs. v. Texaco, Inc.*, No. 03-CV-

⁶ Petitioners cite *Dunlap v. Berger*, 211 W. Va. 549, 558, 567 S.E.2d 265, 274 (2002), for the proposition that “exculpatory provisions must be examined closely for unconscionability, particularly where rights, remedies, and protections that exist for the public benefit are concerned.” Pet. at 11. But Petitioners omit from this quotation the language stating that this rule applies to “contracts of adhesion,” which the Grasselli Deeds are not.

6083T, 2005 U.S. Dist. Lexis 6348 (W.D.N.Y. Mar. 31, 2005) (unpublished) (dismissing negligence claims after finding release from liability for environmental contamination claims valid and enforceable).

Finally, Petitioners are wrong to say that the Circuit Court's enforcement of the Grasselli Deeds is against public policy because it "awarded immunity" to DuPont for illegal activity. Pet. at 12. To the contrary, notwithstanding the Circuit Court's decision in DuPont's favor on this single issue, DuPont has been subjected not only to a substantial jury award of property damages, but also to a substantial jury award of medical monitoring and punitive damage claims of an estimated 8,500 Plaintiffs.

CONCLUSION

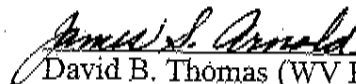
For the reasons discussed above, the Court should deny the Petition.

Respectfully submitted,

E.I. DU PONT DE NEMOURS AND CO.

Respondent

BY COUNSEL:



David B. Thomas (WV Bar No. 3731)

James S. Arnold (WV Bar No. 0162)

Stephanie D. Thacker (WV Bar No. 5898)

Allen Guthrie McHugh & Thomas, PLLC

500 Lee Street, East, Suite 800

Post Office Box 3394

Charleston, West Virginia 25333-3394

(304) 345-7250

Jeffrey A. Hall (*pro hac vice* pending)

Bartlit Beck Herman Palenchar & Scott LLP

Courthouse Place

54 West Hubbard Street, Suite 300

Chicago, Illinois 60610

(312) 494-4400

Counsel for E.I. du Pont de Nemours and Company

Dated: April 7, 2008

BOOK 422 PAGE 151

This deed made and entered into this 29 day of August, 1920, by and between Lewis J. Drummond and Arnie Drummond, his wife,

parties of the first part, and The Grasselli Chemical Company, a corporation formerly organized and existing under and by virtue of the laws of the State of Ohio, and The Grasselli Chemical Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, parties of the second part.

Whereas, said Ohio corporation was, and said Delaware corporation was and is, the owner and operator of a tract of land and a plant thereon, in Coal District in Harrison County, West Virginia, for the manufacture, smelting, extraction or production of zinc and/or other products, and including smelters, gas producers and other structures, equipment, instrumentalities, machinery, appliances, processes and methods; and

Whereas, said parties of the first part are the owner of a tract or parcel of land situate in Coal District, Harrison County, West Virginia, bounded substantially as follows, to-wit:

- on the north by lands of Tillman Sulphery and the heirs of Louisa Riley;
 - on the east by ~~lands of~~ the west Fork River;
 - on the south by lands of Tillman Sulphery and the west Fork River;
 - and on the west by lands of Leta Wright, Ruth Drummond, Tillman Sulphery and Allison Bartlett's Addition to Erie;
- containing twenty (20) acres, more or less, and being the same land acquired by said Lewis J. Drummond

by the following deed, of record in the proper offices in said County: Deed from Amanda A. Weckley and husband dated March 14, 1893, of record in Deed Book No. 87, page 511.

There is intended to be embraced and included, and shall be embraced and included, in the above description all of the land, or estate or interest in land, now owned, possessed or occupied by said parties of the first part, or any of them, situate within a radius of ~~one~~ miles from said plant, whether expressly described, or whether or not embraced or included in the boundaries, acreage or area of same.

DuPont Trial Exhibit
0081

Response Exhibit A

DPZ0030773

BOOK 422 PAGE 152

Now, therefore, in consideration of the premises and for and in consideration of the sum of ten dollars (\$10) and other money in hand paid by said parties of the second part to said part. 1.23 of the first part, the receipt whereof is hereby acknowledged by said parties. 1.23 of the first part, the said part. 1.23 of the first part do hereby remise, release and forever discharge said parties of the second part, and each of them, and the successors and assigns of them and of each of them, of and from all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands, in law or equity, which said part. 1.23 of the first part, or any of them, ever had or now have, or which shall hereafter, or any of them, or the heirs, personal representatives or assigns of, said part. 1.23 of the first part, hereafter can, shall or may have against said parties of the second part, or either of them, or the successors or assigns of them or of either of them, for or by reason of any and all injuries, damages and/or losses of every kind whatsoever, to said land of said part 1.23 of the first part, the productivity and/or products of said land, and/or any property or thing, real, personal or mixed, therein or thereon, and/or any use, usefulness, value or rental value thereof, which have been caused, arisen or resulted, or are caused, arise or result or hereafter may or shall be caused, arise or result from, by reason or out of said plant or the past, present or future existence, construction, maintenance or operation of said plant, or any substance or substances in the past, present or future produced, discharged, emanating, cast, precipitated or escaping therefrom. The release aforesaid and all of the grants, releases, rights, easements, restrictions, covenants and agreements in or by this present deed made, granted, created or imposed shall include and extend to said plant, or any part thereof, as heretofore and/or now existing, constructed or being constructed, maintained or operated, and to any enlargement, alteration or change thereof, and to any new or substituted or other or different plant which hereafter may or shall exist or be constructed, maintained or operated, on said land now owned by said Delaware corporation, for the purposes aforesaid or any of them, and to any and all of the structures, equipment, machinery, appliances, processes and/or methods heretofore and/or now existing or used, or may enlargement, alteration or change thereof, or any new or substituted or other or different structures, equipment, machinery, appliances, processes and/or methods for the purposes aforesaid or any of them, and to the same, or any greater or less size, capacity or extent or quantity of operation or products as or than in the past or present. The substance or substances heretofore and elsewhere in this deed mentioned shall include and extend to any and all solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters and things which have been, are or hereafter may or shall be produced, discharged, emanated, cast or precipitated, or do or shall escape, by or from said plant in, about or by reason of the manufacture, smelting, extraction or production of zinc or any product thereof or any composition of matter or other article consisting or partly consisting of the same, or anything used or acquired for use in, about or for said manufacturing, smelting, extraction and/or production.

And for the consideration aforesaid said part 1.23 of the first part do hereby grant and convey to said The Central Chemical Company, a Delaware corporation as aforesaid, and its successors, and assigns forever, the full, free and perpetual right to construct, maintain, operate and use the said plant, structures, equipment, machinery, appliances, processes and/or methods as heretofore and/or now existing, constructed or being constructed, maintained, operated or used and/or any such enlarged, altered or changed or new or

BOOK 422 PAGE 153

substituted or other or different plant, structural equipment, machinery, appliances, processes and or methods, and to carry on the manufacturing, smelting, extracting and/or producing operations aforesaid, and to produce, discharge, emanate, cast, precipitate and cause or permit to escape the aforesaid substance or substances therefrom and over, on and/or onto said land of said part 1.2.2. of the first part or any property or thing, real, personal or mixed, therein or thereon, without any compensation except the above recited consideration already received as aforesaid; and free, acquit and released from any and all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands of or by said part 1.2.2. of the first part, or any of them, or the heirs, personal representatives or assigns of them, or any of them, said part 1.2.2. of the first part, for themselves, and each of them, and the heirs, personal representatives and assigns of them, and each of them, hereby releasing any and all such notions, causes of action, suits, liabilities, damages, claims, debts and/or demands.

Said part 1.2.2. of the first part, for them, each of them, and the heirs, personal representatives and assigns of them, and each of them, covenant, and agree, that all of the grants, releases, rights, easements, restrictions, covenants and agreements in or by this deed made, granted, created or imposed, shall run with said land and the title thereto and shall bind said land, said part 1.2.2. of the first part, and the heirs, personal representatives and assigns of them, and each of them, and every subsequent owner, possessor or occupant of said land, or any part thereof, and shall inure to the benefit of said parties of the second part and each of them, and the successors and assigns of them and of each of them forever.

Said part 1.2.2. of the first part covenant, and agree, that they have the owner's in fee simple of the tract or parcel of land hereinbefore described, free of all liens and encumbrances, and that they have good and lawful right to grant, make, create and impose the grants, releases, rights, easements, restrictions, covenants and agreements in this deed contained.

The said part 1.2.2. of the first part agree, to dismiss, at their own costs, any and all actions at law and suits in equity now pending in the Circuit Court of Harrison County, West Virginia, in which they, or any of them, are plaintiff or plaintiffs, either alone or with others, and said parties of the second part, or either of them, are defendants or defendant.

This deed is executed by said part 1.2.2. of the first part for the consideration above expressed, and without any promise or representation whatsoever by said parties of the second part, or either of them, or by the agents, attorneys or representatives of them or either of them, to said part 1.2.2. of the first part, or any of them, or to the agents, attorneys or representatives of them, or any of them.

Witness the following signatures and seals:

Miss [Signature]
 _____ (SEAL)
Miss [Signature]
 _____ (SEAL)
 _____ (SEAL)
 _____ (SEAL)

BOOK 122 PAGE 154

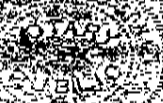
State of West Virginia, County of HARRISON
I, Arthur B. Wilson, a notary public of the said County of HARRISON
do hereby certify that Lewis J. Drummond and Annie Drummond
his wife, whose names are signed to the writing above bearing date the 29 day of AUGUST
1901, have this day acknowledged the same before me in my said County.

Witness my hand this 29 day of April, 1901

Arthur B. Wilson
Notary Public

My commission expires on the 9th day of

May, 1901



RECORDED



STATE OF WEST VIRGINIA
COUNTY OF HARRISON
Lewis J. Drummond
I hereby certify that the above named parties
and their contents are true and correct
July 20, 1901
Tested: [Signature]

131

tions (which is marked for identification "Defendant's Bill of Exceptions No. 11" and prays that the same may be signed, sealed, saved to it and made part of the record, which is accordingly done on this 29th day of September, 1921, and within thirty days after the adjournment of the term of said Court at which the judgment was rendered in said case.

HAYMOND MAXWELL (SEAL)
Judge of the Circuit Court of
Harrison County, West Virginia.

page 1-a] IN THE CIRCUIT COURT OF HARRISON
COUNTY, WEST VIRGINIA:

Allison Bartlett

vs.) Case.

Graselli Chemical Company.

BE IT REMEMBERED, that on the trial of this case, at the September term, 1920 of said court, to-wit, on the 23rd day of September 20, 1920, and after the jury had been sworn, the said plaintiff, to maintain the issue upon his part, introduced the following evidence.

MR. HOGG: Under the notice served on the defendant on the 13th day of September, 1920, the plaintiff moved the court to require the defendant to produce the report of Firman E. Bear of the Department of Chemistry and Soils in the College of Agriculture in the Ohio State University, of his investigation of the agricultural conditions surrounding the plant as set forth in the notice.

THE COURT: The report of Professor Bear is referred to in the argument by counsel for plaintiff as evidence and as material evidence. I do not understand, gentlemen, that an *ex parte* statement, whether confidential or not, of any agent or of any party, is testimony or evidence for or
page 2-a] against the principal. The Court overrules the

motion to require the production of the papers mentioned in the notes.

MR. HOGG: Exception to the ruling of the court.

ELLIS LYON, a witness of lawful age called on behalf of the plaintiff, being first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Hogg:

Q. Mr. Lyon, tell the jury where you live and how long you have lived there?

A. I live at Hepzibah on the West Virginia Shortline, on the Shortline Railroad, and I have lived there about thirty-five years.

Q. What is your occupation?

A. I am engaged in—or have been engaged in farming, real estate, and oil and gas.

Q. How long have you had experience in farming?

A. All my life.

Q. Where did you engage in farming?

A. Where I now live for the past thirty-five years.

Q. Do you know where the manufacturing plant of the Grasselli Chemical Company is located at Zeising?

A. Yes sir.

page 3-a] **Q.** Well, there are two of these plants, one of them is located at what point?

A. One of them is located at Grasselli, and the other at Zeising.

Q. Do you know where the farm of the plaintiff, Allison Bartlett, is situated?

A. Yes sir.

Q. How long have you known that farm?

A. I have known it more or less all my life, but I have known it more particularly for the last thirty-five years.

Q. Does he live on that farm, Allison Bartlett?

1141

Q. May I ask you who accompanied you on this trip to the farm?

A. Yes, you can ask me.

Q. Who was it?

A. Mr. Shaver.

Q. Mr. Mose Shaver?

A. I do not know his given name.

RE-DIRECT EXAMINATION

By Mr. Smith.

Q. You spoke of a water tank up the hill—see page 1539-a) distance; about what part of the way up the hill?

A. Right on top of the hill; not the highest point in the farm, but on the top, in a low gap.

Q. A considerable part of the farm is higher than the water tank,—it being on the hill?

A. Not a considerable part; some lands higher each way.

Q. You spoke of not being acquainted with the Meigs clay soil. You mean you are not familiar with the names of the clays and other soils as assigned by the U. S. Geological or Soil Survey?

A. I have no acquaintance with their terms.

Q. You spoke of soil being poor, or there being almost an absence of soil between the street car line and the Short Line Railroad. Please describe the character of that land as to being sandy or otherwise.

A. We would call it a sandy soil.

MR. HOFFHEIMER, of counsel for defendant company:

The defense rests.

MR. HOGG, of counsel for plaintiff:

The plaintiff requests the court to send the jury to the premises of Allison Bartlett with a view to looking at them and making such examination of the surface and topography of the

1542

form as are indicated by any parties to discuss, without any comment in the presence of the jury.

page 1540-a] **MR. HOFFHEIMER:** The defendant, if Your Honor please, objects to the granting of the motion, and to the view.

page 1541-a] On this 9th day of October, 1938, the further taking of this evidence is hereby resumed.

THE COURT: Upon consideration of the motion to permit and direct the jury to view the Allison Bartlett property involved in this suit, the court is of opinion to overrule the motion; to which action of the court in overruling said motion, the plaintiff, by counsel, excepts.

MR. HOFFHEIMER: And now, at the close of all the evidence, the defendant moves the court to direct the jury to find a verdict for the defendant. The grounds of said motion are the following:

First: That no cause of action has been shown by the evidence.

Second: That upon the whole evidence the plaintiff is not entitled to recover.

Third: That it has not been proved by a preponderance of the evidence that the alleged injuries to the plaintiff were caused by the defendant, or the existence or operation of its plant.

Fourth: That there is no basis in the evidence for a proper assessment of damages by the jury.

Fifth: That the plaintiff's right of action, if any, be ever had, is barred by the statute of limitations.

1143

page 1542-a] **THE COURT:** In the granting of which motion to dissent a verdict, plaintiff objects. And upon consideration whereof, the court is of opinion to overrule the said motion; and to which action of the court the defendant excepts.

Which was all of the evidence introduced on the trial of this case.

And on another day, to-wit, on the 11th day of October, 1890, and during the argument of counsel, Mr. Bartlett, of counsel for plaintiff, said in part, as follows:

MR. BARTLETT: We tried to get that report of Mr. Haver. We wanted to see it in evidence to show that our evidence was right. But could we get it?

CAPTAIN SPERRY: That is objected to.

THE COURT: That is not proper. The jury will disregard what counsel has just said in argument, with reference to the supposed Haver report. It has no place in your consideration at all.

MR. SMITH: Even notwithstanding your Honor's very explicit direction, we object and except to this argument that has just been made on the Haver report, on the grounds that it is so highly improper, and so well known to be improper by counsel, and so impossible from contradiction that it must
page 1543-a] forever remain error.

THE COURT: Proceed with the argument. And at the conclusion of the argument the court directed the jury as follows.

THE COURT: Gentlemen, in the course of argument of counsel this morning, reference was made to an alleged report by one Haver. Objection was made at the time by opposing counsel to that reference made in argument. The court then directed you to disregard what counsel had said in argument, advising you that that matter to which reference was made has no place in

1144

your consideration in the determination of this case. I want to emphasize that further; the remarks of counsel with reference to that matter were wholly improper and ought not to have been made, and I am surprised and agrieved that they were made; most emphatically they were improper, and I again direct you to disregard this reference to that matter as suggested in argument, entirely. That matter was discussed and disposed of by the court in your absence, and a matter with which you have nothing to do, and counsel ought not to have presented it to you. Disregard entirely the matter and pay no further attention to it in your consideration of the case.

MR. HOFFHEIMER: The defendant, con-
page 1144-a] ceiving that it has been prejudiced by the state-
ments made by Mr. Bartlett, of counsel for plain-
tiff, in his argument to the jury, concerning the alleged report
of Mr. Ruzar and the efforts and notice of the plaintiff to pro-
cure production thereof, and believing that such prejudice has
not been avoided nor the error cured by the direction of the
court to the jury to disregard said statements, or otherwise
avoided or cured, the defendant, before commencement of argu-
ment of its counsel respectfully moves the court to withdraw a
juror and to order a mistrial. In this connection attention of
the court is invited to the ruling at the beginning of the trial
that the plaintiff was not entitled to production of said report.

THE COURT: The motion is overruled. But the court at
this time again instructs the jury to disregard the improper
remarks made by Mr. Bartlett.

MR. HOFFHEIMER: To which opinion and ruling of the
court in overruling said motion, the defendant excepts.

page 1145-a] State of West Virginia,

Harrison County, 10-011:

I, O. L. Haight, Official Shorthand Reporter for the Circuit
Court of Harrison County, West Virginia, do certify that the
foregoing is a true, full and complete transcript of all of the

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al.,

Petitioners,

v.

No. 080721

E.I. DU PONT DE NEMOURS AND COMPANY, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, James S. Arnold, counsel for Respondent, E.I. du Pont de Nemours and Company, hereby certify that service of "Respondent DuPont's Response to Petitioners' Petition for Appeal" has been made upon counsel of record via Regular U. S. Mail and Federal Express for overnight delivery on this 7th day of April, 2008, addressed as follows:

Regular U. S. Mail

R. Edison Hill, Esq.
Hill, Peterson, Carper, Bee & Deitzler, PLLC
500 Tracy Way
Charleston, WV 35311-1261

Federal Express

J. Farrest Taylor, Esq.
Cochran, Cherry, Givens, Smith, Lane &
Taylor, P.C.
163 W. Main Street
Dothan, AL 36302

James S. Arnold (WV Bar No. 0162)
 Allen Guthrie McHugh & Thomas, PLLC
 500 Lee Street, East, Suite 800
 Post Office Box 3394
 Charleston, West Virginia 25333-3394
 (304) 345-7250

James S. Arnold

Gary W. Rich, Esq.
 Law Office of Gary W. Rich, L.C.
 212 High Street, suite 223
 Morgantown, WV 26505
 Perry B. Jones, Esq.
 Gerald E. Jones, Esq.
 West & Jones
 212 High Street, Suite 223
 Clarksburg, WV 26302